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NTSB Order No. EA-4013

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of November, 1993

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. TOMMY V. WILSON, Respondent.	Docket SE-13275

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on September 8, 1993, following an evidentiary hearing.[1] The law judge modified an emergency order of the Administrator by reducing the Administrator's proposed revocation of respondent's inspection authorization to a 120-day suspension of that

[1]The initial decision, an excerpt from the hearing transcript, is attached.

certificate. We grant the appeal to the extent of reinstating the order of revocation.

The Administrator's order arose as a result of a complaint from a dissatisfied buyer of a Cessna 172. Respondent had certified to having performed an annual inspection on the aircraft shortly before it was sold. Upon receipt, the buyer began noticing what he considered to be serious problems with the aircraft. Following extensive work on the aircraft and its inspection by the FAA, this complaint was brought. Respondent was charged with failing to perform the required inspection, in violation of 14 C.F.R. 43.15(a)(1), and, in certifying the annual inspection and the aircraft's airworthiness, making an intentionally false entry in the aircraft log, in violation of § 43.12(a)(1).[2]

The Administrator's complaint, insofar as the § 43.15(a)(1) claim is concerned, listed five specific equipment defects.[3] The

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[2]Section 43.12(a)(1) reads:

(a) No person may make or cause to be made:

(1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part[.]

Section 43.15(a)(1) reads:

(a) General. Each person performing an inspection required by Part 91, 123, 125, or 135 of this chapter, shall -

(1) Perform the inspection so as to determine whether the aircraft, or portion(s) thereof under inspection, meets all the applicable airworthiness requirements[.]

[3]The complaint read, as pertinent (and as amended at the

§ 43.12(a)(1) falsification claim was premised on the theory that so much was wrong with the aircraft that respondent had to be lying when he certified to the annual inspection. See, e.g., Tr. at 245 (the discrepancies were so obvious that the sign-off in the logbook had to have been falsified).

The law judge dismissed the falsification charge and, in light of that action, reduced the sanction as noted above. The Administrator, on appeal, argues that the law judge's dismissal must be reversed because the overwhelming weight of the evidence establishes that respondent could not have conducted the

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hearing):

> [Y]ou . . . returned the aircraft to service as airworthy, when in fact it did not meet many airworthiness requirements affecting the safety of flight, including but not limited to the following:
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> a. The elevator bellcrank bracket was broken.
> b. Four out of six aft fuselage pulleys were frozen.
> c. Six rivets were missing from the right inboard seat track, which was badly corroded.
> d. Three rivet heads were missing at the rear upper cabin fuselage center section.
> e. [deleted]
> f. The rudder upper and lower hinge brackets at the vertical stabilizer spar were corroded through, with rivets missing.

At the hearing, the Administrator offered considerable testimony regarding additional discrepancies in the aircraft. See Exhibit C-10 list of 44 discrepancies. We need not resolve the propriety of considering these items as the law judge did not look to any matters outside those listed in the complaint nor do we.

(Although the Administrator indicates that ¶ c was amended to read six rivet **heads**, and his witness spoke to the lack only of rivet heads, we can locate no actual complaint amendment in this respect in the transcript. The difference is not material to our decision.)

inspection to which he certified and, therefore, that his statements in the log were intentionally false. In making this argument, the Administrator appreciates that he is seeking that we overturn the law judge's credibility finding. The Administrator further argues that revocation is the appropriate sanction, whether the falsification charge is reinstated or dismissed.

As the law judge noted, there are three elements of proof for a finding of intentional falsification: 1) a false representation; 2) in reference to a material fact; and 3) made with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976), citing Pence v. United States, 316 U.S. 332, 338 (1942). The law judge further and correctly found that, if circumstantial evidence is used to prove actual knowledge, as it was in this case (there being no direct evidence), that circumstantial evidence must be so compelling that no other determination is reasonably possible. Administrator v. Hart, 3 NTSB 24, 26 (1977). The law judge failed to find the requisite actual knowledge on respondent's part and, as a result, dismissed the falsification charge.

To overturn this credibility finding, we must be able to conclude that the law judge acted arbitrarily, capriciously, or that the result was incredible or against the overwhelming weight of the evidence. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited therein (resolution of credibility issues, unless made in an arbitrary or capricious manner, is

within the exclusive province of the law judge); Chirino v. NTSB, 849 F.2d 1525, 1530 (D.C. Cir. 1988) (Board will reverse law judge's finding when testimony is "inherently incredible."); Administrator v. Klayer, 1 NTSB 982, 983 (1970). We are unable to reach any such conclusion.

First, there is no arbitrariness or capriciousness in the law judge's decision. His conduct of the hearing and his initial decision reflects that he thoroughly explored the details of the complaint and the evidence. He conducted extensive questioning of the respondent. Tr. at 340-356.

Second, the Administrator has not demonstrated that respondent's testimony was incredible or against the overwhelming weight of the evidence, so as to support reversal of the law judge's finding and permit a conclusion that respondent intentionally falsified the logbook. Because he is the trier of fact and has the opportunity to observe witness demeanor, the law judge's credibility findings are entitled to substantial deference. Administrator v. Klock, NTSB Order EA-3045 (1989) at 4 (law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations...were put forth...."); Administrator v. Bargen, 5 NTSB 757, 760 (1985) (credibility determinations are not to be disturbed absent clear error).

We decline the Administrator's invitation to dismiss the possibility, accepted by the law judge, that, rather than knowingly certifying to an inspection he had not performed,

respondent's inspection was inadequate. Moreover, the record is not without support for the latter proposition. Respondent did do considerable work on the aircraft (including repairs to brakes, left elevator, and engine, see Exhibit C-13 and C-14 airframe and engine logs), and test flew the aircraft, identifying no problems.[4] Respondent testified, with regard to the elevator bellcrank bracket (Complaint, ¶ 2a), that he used a flashlight and mirror, rather than removing the inspection plate (an apparently acceptable technique, see Tr. at 234), and that he did not detect that the bracket was broken. He further testified that the controls worked normally, and the Administrator did not prove otherwise.[5]

Also supporting the law judge's decision is the testimony of the certified mechanic (also with an inspection authorization and with 20 years' experience), who conducted a prepurchase inspection of the aircraft for the buyer and reported on it favorably. Mr. Robinette checked many of the items alleged by the Administrator to be discrepancies. For example, he testified that he checked the cables and pulleys and found them to be in acceptable condition. Tr. at 91. The corrosion found unacceptably severe by the Administrator was considered by Mr.

[4]The purchaser also flew the aircraft prior to his purchase and, at the hearing, admitted that none of the problems he noticed soon after had exhibited itself during his test flight.

[5]The bracket remained anchored to the bulkhead, although only by a "couple of" rivets. Tr. at 106-107.

Robinette not to be significant. Tr. at 89, 98.[6] The Administrator argues that the problems with the aircraft were obvious, yet Mr. Robinette's inspection, although brief, did not expose them.

Even as to instances where respondent had no explanation for the discrepancies (e.g., missing rivet heads on the outside of the aircraft, Complaint ¶ 2d; frozen pulleys, ¶ 2b), we decline to reverse the law judge. Carelessness or poor technical skills are other plausible, and not incredible, causes of the defective inspection. Accordingly, the Administrator's citation to Administrator v. Mims, NTSB Order EA-3284 (1991), is unavailing.

The Administrator's reliance on Administrator v. Berglin, EA-2846 (1993), is also misplaced. In that case, the law judge found that respondent certified to the annual inspection when he knew that some of the necessary work had not been done. Thus, in contrast to this case, the law judge in Berglin found actual knowledge of a false statement.

Despite our refusal to reverse the law judge's dismissal of the § 43.12(a)(1) charge, we grant the Administrator's appeal of the law judge's sanction reduction and affirm the order of revocation. The law judge offered no reason why he reduced the sanction, and revocation is appropriate where respondent is shown to lack the care, judgment, and responsibility required and expected of a certificate holder.

[6]The aircraft was approximately 30 years old and had recently been brought from Florida, where the humidity and salt air have a corrosive effect.

In this case, the law judge found respondent to have violated § 43.15(a)(1). Among other things, the law judge found that respondent failed to detect the missing rivet heads on the outside of the aircraft and the corroded and broken rudder upper and lower hinge and elevator bellcrank brackets, and failed to investigate the seat track sufficiently to notice the extent of the corrosion.[7] The elevator bellcrank and rudder brackets are established, on the record, to affect the airworthiness of the aircraft. Through these two failures alone, respondent returned to service an aircraft that was not safe to operate. With only one of three connections remaining, the rudder could have come off in flight; the elevator bellcrank bracket is integral to the elevator control system.[8]

Respondent's testimony supports the conclusion that his inspection of this aircraft was superficial at best, despite the discrepancies that he did repair. Knowing the age and prior location of the aircraft should have put respondent on notice to be especially vigilant.[9] Instead, these factors may have been

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[7]Respondent admitted that he should have seen the damage to the rudder and bellcrank brackets and would have replaced them. Reply at 16. He also agreed that he should have investigated the seat rail further. Tr. at 350-351.

[8]The transcript establishes that, to some degree, a decision to make repairs is a matter of discretion and experts may disagree as to the effect of a discrepancy on airworthiness. However, given these two clear and serious safety problems and his admissions, respondent's exercise of discretion is not at issue here.

[9]We reject any suggestion that respondent's performance

seen as justification to perform only a cursory inspection in many areas. We agree with the Administrator that holders of inspection authorizations must meet the highest level of trustworthiness, and that respondent cannot be said to meet that standard. Accord Administrator v Sayler, 2 NTSB 366 (1973), and Administrator v. Garrelts, NTSB Order No. EA-3136 (1990).[10]

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted to the extent of reinstating the order of revocation; and

2. The initial decision in all other respects is affirmed.[11]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

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should be excused because prior annual inspections had likely been incomplete as well.

[10]Respondent cites three cases for the proposition that if the underlying offenses are not egregious or if mitigating factors exist the Board will limit sanction to suspension rather than revocation of certificates. Administrator v. Ballan, 2 NTSB 1136 (1974), which reduced a sanction from revocation to suspension in the case of an intentionally false statement in a medical application, is a sanction reduction that does not comport with current law. We fail to see how Administrator v. Watkins, 5 NTSB 2322 (1987), and Administrator v. Johnson, 5 NTSB 279 (1985) are on point, as both involved revocation, albeit the sanction was limited to revocation of medical certificates.

[11]The Administrator's order does not extend to respondent's mechanic certificate. Thus, he may perform mechanical work, but will not be able to perform an annual inspection and sign off on that work.